89-498

No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

THE HELLENIC REPUBLIC, a Foreign Country, THE HELLENIC REPUBLIC NATIONAL AGRICULTURAL INSURANCE INSTITUTE, a Greek Institution, and THE SOCIAL INSURANCE INSTITUTE OF GREECE, a Greek Institution,

Petitioners,

v.

RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, THE CHICAGO REGIONAL ORGAN AND TISSUE BANK, DR. FREDERICK K. MERKEL, JUNE D. BAJOR, and SOUTH CHICAGO COMMUNITY HOSPITAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

Whether THE HELLENIC REPUBLIC and its institutions, in the performance of their constitutional and legal obligations to provide medical care to Greek citizens, exercised a governmental function or engaged in a commercial activity, as described in 28, U.S.C., Section 1605(a)(2) of the Foreign Sovereign Immunities Act, by contracting to have kidney transplant operations performed upon its nationals in the United States.

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Petitioners, THE HELLENIC REPUBLIC, a Foreign Country, THE HELLENIC REPUBLIC NATIONAL AGRICULTURAL INSURANCE INSTITUTE, a Greek Institution, and THE SOCIAL INSURANCE INSTITUTE OF GREECE, a Greek Institution, through their attorneys, GEORGE C. PONTIKES and THEODORE RODES, JR. of PONTIKES, PORIKOS, RODES & ECONOMOS, pray that a Writ of Certiorari be issued to The Court of Appeals for the Seventh Circuit for review of the judgment of that court in this case.

III. OPINIONS BELOW

The opinion of the Court of Appeals is unreported as of the date of the filing of the Petition. A copy is attached as Appendix A. The opinion of the District Court is reported at 690 F.Supp. 682 (N.D.Ill., 1988). A copy is attached as Appendix B.

IV. STATEMENT OF JURISDICTION

A. The Petition is timely filed within sixty (60) days of the decision of the court of Appeals for the Seventh Circuit, dated June 14, 1989. Since the Sixtieth day falls on a Sunday, August 13, 1989, the Petition will be timely, filed on August 14, 1989 in accordance with Rule 29 (1) of the Rules of Practice of the Supreme Court of the United States.

B. No petition for rehearing was filed in the Court Below and there has been no extension of time within which to petition for Certiorari.

C. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1254 (1).

V. STATUTES INVOLVED

28 U.S.C.

Section 1602 Findings and Declaration of Purpose

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under interna-

tional law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the sarisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Section 1603 Definitions

For purposes of this chapter -

(a) A "foreign state", except as used in Section 1608 of this title [28 U.S.C.S. Section 1608}, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state: means any entity -

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title [28 U.S.U.S. Section 1332 (c) (d)], nor

created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Section 1604 Immunity of a Foreign State from Jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607 of this Chapter. [28 U.S.C.S. Sections 1605-1607][1]

Section 1605 General Exceptions to the Jurisdictional Immunity of a Foreign State

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

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1 Section 1607 is here irrelevant.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

VI. STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

The District Court Below had jurisdiction under 28 U.S.C., Sections 1330 and 1602, in that this case involves a nonjury civil action against a foreign state as defined in 28 U.S.C. Section 1603(a) unless the Defendants-Appellants were immune from jurisdiction as provided in 28 U.S.C. Sections 1604 and 1605.

Respondents, RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER ("RUSH"), and intervening Plaintiff-Appellee, SOUTH CHICAGO COMMUNITY HOSPITAL ("SOUTH CHICAGO"), each filed two count complaints for breach of contract and recovery for unjust enrichment or quantum meruit (J.App.2, pp. 9-19, and Exhibits at J.App.3, pp. 20-254; J.App.8, pp. 312-318, Exhibits at J.App.9, pp. 319-602)[2] against the Petitioners, THE HELLENIC REPUBLIC, a foreign country, THE HELLENIC REPUBLIC NATIONAL AGRICULTURAL IN-

2 Joint Appendix is abbreviated "J.App." and refers to the joint Appendix in the Court of Appeals for the Seventh Circuit; references are to Sub-Tabs in the separate volumes, abbreviated "Sub-T." and refers to the joint Appendix in the Court of Appeals for the Seventh Circuit, and Pages are abbreviated "p or pp."

SURANCE INSTITUTE ("OGA")[3] a Greek institution, and THE SOCIAL INSURANCE INSTITUTE OF GREECE ("IKA"),[4] a Greek institution. RUSH and SOUTH CHICAGO alleged that Respondent, DR. FREDERICK K. MERKEL ("MERKEL") and his business entity, Respondent CHICAGO REGIONAL ORGAN & TISSUE BANK ("BANK") contracted with THE HELLENIC REPUBLIC to provide kidney transplants for Greek citizens, and, for identified patients, THE HELLENIC REPUBLIC, IKA and OGA guaranteed to pay MERKEL and the BANK for such kidney transplants, pursuant to the provisions of the contract. Both RUSH and SOUTH CHICAGO alleged that MERKEL and the BANK entered into the contract with THE HELLENIC REPUBLIC, acting on behalf of or as

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3 The Term "OGA" is literally translated as "Organization of Agricultural Securities." On the basis of its legal structure and function, "OGA" is better translated as "Organization of Agricultural Group Insurance." In order to convey the appropriate meaning, the translations of the Greek law and regulations which are exhibits to Petitioners' Motion to Dismiss (J.App. 12, pp. 617-723) utilize the terms "agricultural group insurance" to describe the words that might be literally translated as "agricultural insurance" or "agricultural security."

4 The term "IKA" is literally translated as "Institute of Social Securities." On the basis of its legal structure and function, "IKA" is better translated as "Institute of Public Group Insurance." In order to convey the appropriate meaning, the translations of the Greek law and regulations, which are exhibits to Petitioners' Motion to Dismiss (J.App.12, pp. 617-723), utilize the terms "public group insurance" to describe the words that might otherwise be literally translated as "social insurance" or "social security."

agents for RUSH and/or SOUTH CHICAGO, who were, therefore, undisclosed principals.[5]

MERKEL and the BANK (as well as Respondent, JUNE D. BAJOR, who is the BANK's Director of Development)[6] filed a First Amended Intervening Complaint alleging that MERKEL and the BANK contracted with THE HELLENIC REPUBLIC, and alleging breach of that contract, as well as a second count for recovery quantum meruit. (J.App.5, pp. 262-277; J.App.6 pp. 278-305) MERKEL and the BANK did not allege that they were anyone's "agent" with respect to the contract. MERKEL and the BANK filed no response to Defendants-Appellants' Motion to Dismiss below, nor did they file a brief on appeal in the Court of Appeals of the Seventh Circuit Below. All three complaints asserted jurisdiction over THE HELLENIC REPUBLIC, IKA and OGA, in that the contract with MERKEL and the BANK and the guarantees pursuant to that contract to MERKEL and the BANK constitute commercial activities by THE HELLENIC REPUBLIC and its institutions subjecting them to jurisdiction in the United States. It was conceded for all purposes by MERKEL and the BANK, and for purposes of the Motion to Dismiss by RUSH and SOUTH CHICAGO, that THE HELLENIC REPUBLIC is a foreign state, and that IKA and OGA, are governmental agencies of THE HELLENIC REPUBLIC. (J.App.6, p. 279; J.App.14, p. 758; J.App.8, p. 313).

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5 Actually both RUSH and SOUTH CHICAGO alleged that Petitioners are liable to them directly because MERKEL, BAJOR and the BANK acted on their behalf (J.App.2, pp. 2-3), or as their agent (J.App.8, p. 3), or that the guarantees of payment ran directly to them (J.App.2, p.2).

6 BAJOR will not be mentioned hereinafter as she is really a secondary party to MERKEL and the BANK.

Petitioners filed a Motion to Dismiss asserting sovereign immunity from suit pursuant to international law and pursuant to the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. Section 1602, et seq. on September 30, 1987. (J.App. 11, pp. 612-616). The Motion was fully briefed with supporting memoranda and exhibits. (J.App.12, 00. 617-723; J.App.13, pp. 724-751; J.App.14, pp. 752-806; J.App.15, pp. 807-841; J.App.16, pp. 842-854). On July 11, 1988, the District Court denied the Petitioners' Motion on the ground that Petitioners' conduct constituted commercial activity within the meaning of Section 1605(a) (2) of the Foreign Sovereign Immunities Act. (J.App.17, pp. 855-867). Upon Motion by Petitioners, the District Court amended the Order of July 11, 1988, by Order of August 10, 1988. (J.App.18, p. 686). A Notice of Appeal was filed on August 24, 1988. (R. 112). On July 14, 1989, the Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. (App.A, 1-a- 1-).[7]

B. STATEMENT OF FACTS

The HELLENIC REPUBLIC, is a foreign sovereign. IKA and OGA, are public law entities created by the laws of Greece to provide various social security benefits, including medical and health care benefits to the citizens of Greece. (J. App. 11, sub-T. D, pp. 637-642; sub-T.F, pp. 649-655; sub-T.L, at p. 692; sub-T. P, at p. 717)

The Constitution of THE HELLENIC REPUBLIC, in Article 21, paragraph 3 requires it to care for the health of all of its citizens and to adopt special measures for the protection of youths, the elderly, the disabled, and for relief of the needy. (J. App. 12, sub-T. H, pp. 658-658.) THE

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7 "App." refers to the Appendix to this Petition.

HELLENIC REPUBLIC carries out this obligation, including the provision of health care benefits, through the Ministry of Health, insofar as public employees are concerned;[8] (J. App. 12, sub-T. B, pp. 625-629), by IKA under the aegis of the Ministry of Labor for private sector employees;[9] (J. pp. 12, sub-T. F, pp. 649-655), and by OGA under the aegis of the Ministries of Agriculture and Labor for agricultural workers, farmers and fishermen.[10] (J. App. 12, sub-T. D, pp. 637-642) In addition to health care benefits, THE HELLENIC REPUBLIC, IKA and OGA provide other Social Security benefits such as disability income, unemployment compensation, retirement pensions and funeral expenses.

The benefits provided by THE HELLENIC REPUBLIC, IKA and OGA are funded by compulsory contributions from employees and workers, special earmarked taxes (such as a tax on cigarettes) and supplementary funds from the General Treasury. (J. App. 12, sub-T. L, pp. 681-693; sub-T. P, pp. 715-719 [plus one more page, numbered 6 of that exhibit, which apparently was not numbered with other exhibit pages]) The Greek Social Security system is not dissimilar to the Social Security program of the United States. It is funded by contributions paid on earnings and designated special social taxes established by law. (J. App. 12, sub-T. L, p. 689; sub-T. B, pp. 628-629) Such funds are governmental trust funds. When necessary, legislation is enacted for provision of supplemental funds from the General Treasury of THE HELLENIC REPUBLIC. (J. App. 12, sub-T. L, p. 692) Benefits provided are scheduled benefits to Greek citizens. Actuarial estimates are periodically made to insure

8 This would include patient John Spanos.

9 This would include patients Antonia Economakou, Elias Georgiou, Aristomenis Michalopoulos, Adamantios Ahladiotis and Panagiotis Alatsas.

10 This would include patients Vassilios Pilarinos, Panagiotis Daskalopoulos, Panagiotis Panagopoulos, Anastasia Papakonstadinou and Stavroula Soufleri.

the short-range and long-range integrity of the funds available to provide the Social Security benefits required by law. There are administrative remedies in Greece for recipients and providers of services within or without the country of Greece.

When medical or health benefits are provided to Greek citizens within Greece, such benefits are allowed according to strict schedules and are paid only to State hospitals, or to doctors, hospitals or institutions having a signed contract with the Ministry of Health or the appropriate public law entity. (J. App. 12, sub-T. N, pp. 701-702; sub-T. R, pp. 721-723) Payments are not made for health benefits in an amount exceeding scheduled benefits.

As Argyro Mousouri, the Director of the Branch of Health of OGA, states in her Affidavit:

> The health care provided by OGA, as well as the other benefits, including a variety of programmed (budgeted) benefits, such as treatment costs, pension, funeral costs, are covered primarily by the state budget and by the amount of 225 million drachmas derived from the income of the organization (article 4 of A.N. 29/67 FEK 97/A.14-6-671, article 23 of Law 4169 and article 1 par. 3 Law 1296/82). When medical or health benefits are provided to Greek citizens within Greece, such benefits are allowed according to strict schedules which have been implemented by law (article 7 of Law 4169/1961 as replaced by article 7 of n.d. 1390/73 and completed with Law 1140/81), and the related payments for these are made to state hospitals or institutions which have signed an agreement with OGA. Payments cannot be made for care that is not programmed and no payment can be made in excess of the programmed amount within Greece, and cannot be made on the basis of quan-

tum meruit. (J. App. 12, sub-T. D, p. 639) See also Affidavit of Argyrios Exarhakos (J. App. 12, sub-T. B, p. 627), and Affidavit of Constantinos Mavromatis (J. App. 12, sub-T. F, p. 651).

When health benefits are required outside of THE HELLENIC REPUBLIC, because a citizen happens to be outside of the country, or a procedure is required which is better performed outside of Greece, THE HELLENIC REPUBLIC is unable to exercise as complete a control as it would for health benefits payable within the country, but it is still required, since it is utilizing limited and specially designated funds, to exercise control over the reasonableness and amounts of health benefits which it would agree to pay. (J. App. 12, sub-T. B, p. 627; sub-T. D, p. 639; sub-T. F, p. 651) This control is generally exercised by the entry into a contract, as in the instant case.

In December of 1983, MERKEL and the BANK entered into a contract with THE HELLENIC REPUBLIC, specifically the Ministry of Health. (J. App. 3, pp. 23-25) The contract was drafted by MERKEL and the BANK. The contract contains an estimate of the total cost of a kidney transplant in Chicago, which estimate was prepared by MERKEL and the BANK, and on which THE HELLENIC REPUBLIC relied as the norm for a single transplant procedure without complications. Costs, which are set forth, include per diem costs, laboratory testing, x-rays, physician's fees, and additional services, such as intensive care, pulmonary and physical therapy. The estimated costs were itemized by MERKEL and the BANK for the benefit of THE HELLENIC REPUBLIC, as follows:

Pre-transplant dialysis (1 wk)	$600.00
Pre-transplant lab testing	100.00
Pre-transplant cross-match	250.00
Cadaver kidney cost	10,050.00
Administrative costs	5,000.00

Transplant procedure (15 days)	19,000.00
TOTAL	$ 35,000.00

The contract provided that, if there were complications resulting in additional hospitalization and/or additional surgery, additional funds might be required. The Ministry relied on these figures provided by MERKEL and the BANK. (J. App. 12, sub-T. B, p. 4; sub-T. D, p. 640; and sub-T. F, p. 652)

After the contract was entered into, certain Greek nationals were sent to the United States for kidney transplants. MERKEL and the BANK submitted bills for each patient to THE HELLENIC REPUBLIC, through the Consulate in Chicago, which bills included MERKEL's fees, as well as hospital bills, lab fees, etc. MERKEL and the BANK billed THE HELLENIC REPUBLIC the following amounts, and it has paid the following amounts to date:

Patient	Billed	Paid
Spanos	$ 68,966.48	$ 67,989.48
Economakou	100,049.42	27,000.00
Georgiou	81,868.70	27,500.00
Michalopoulos	169,769.43	32,514.00
Pilarinos	87,049.22	69,980.00[11]
Ahladiotis	80,205.57	20,000.00
Alatsas	56,069.90	19,965.01
Daskalopoulos	79,434.79	20,000.00
Panagopoulos	48,627.63	35,000.00
Papakonstadinou	120,291.86	35,000.00
Soufleri	64,989.56	20,000.00

The Process for reviewing and paying such bills is explained by Argyro Mousouri, the Director of the Branch of Health of OGA, as follows:

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11 Pilarinos had two transplant operations.

... OGA has established, by law, (article 21 and 22 of the Regulation for Hospital Treatment of the insured of OGA which was validated with the decision No. 400/106/3/24.2.79 of the Minister of Social Services) the following procedure for the review of bills, like the ones submitted by Dr. MERKEL and the CHICAGO REGIONAL ORGAN & TISSUE BANK, in order to approve the bills and to pay them in their entirety or in part: OGA must receive a complete accounting related to the supporting documents for the expenses of treatment that were incurred and in the event of extraordinary billing in excess of $35,000.00 (complications of patient), supporting documents, including medical reports, demonstrating the necessity for every extraordinary billing in excess of $35,000.00. Nevertheless, the documentation and back-up (bills, receipts from doctors and the rest) are also required for amounts up to the $35,000.00 that Dr. MERKEL and the CHICAGO REGIONAL ORGAN & TISSUE BANK estimated that an average kidney transplant would cost. The reports, records and supporting documents are examined by the appropriate departments of OGA (14th Health Department and Branch C of Health). If additional reports, supporting documents and others are required, they will be requested and Branch C will postpone the approval all or part of the bills until all the supporting documents in question are submitted and evaluated. Upon approval of the above appropriate Departments of OGA A recommendation is made by Branch C for the final approval to the Governor of the Organization. The Governor of OGA issues a decision regarding the amount of the expense incurred, which the organization must pay for the granting of the health care that it has

> the obligation to provide to the insured citizen. . . . (J. App. 12, sub-T. D, pp. 640-641)

A similar procedure is utilized by IKA and the Ministry of Health, Care and Public Group Insurance. (J. App. 12, sub-T. B, p. 627; sub-T. F, p. 651) This procedure has never been completed due to the failure of MERKEL and the BANK to provide necessary documentation.

VII. REASONS FOR ISSUANCE OF THE WRIT

This Court must decide an important question of federal law, which has not been but should be settled by the Court, namely, whether THE HELLENIC REPUBLIC and its institution, in fulfilling their contractual and legal obligations to provide medical care to Greek citizens, exercised a governmental function or engaged in a commercial activity, as described in the Foreign Sovereign Immunities Act, by contracting to have kidney transplant operations performed upon its nationals in the United States.

THE HELLENIC REPUBLIC, IKA and OGA are entitled to immunity from the jurisdiction of the courts of the United States, unless they are subject to one of the exceptions specified in 28 U.S.C., Section 1605. *Verlinden B. V. v. Central Bank of Nigeria,* 461 U.S. 480, 488, 76 L. Ed. 2d 81, 103 S. Ct. 1062 (1983). The question in this case is whether the Petitioners have engaged in commercial activity under one of the threshold exceptions in 28 U.S.C. Section 1605(a)(2) which would destroy their immunity from suit. Petitioners executed a contract as part of their mandatory obligations to provide medical care for its citizens. This Court has never determined the question of whether such activity is governmental in nature or commercial.

Under the provision of 28 U.S.C. Section. 1605(a) (2), a foreign state is not immune from suit if it fits any one of three

exceptions there set forth. The first exception is that the action must be based "upon a commercial activity carried on in the United States by the foreign state." The second exception is that the action is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." The third exception is that the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Central to each of the exceptions is the issue of what constitutes commercial activity.

Clearly the provision of Social Security and health benefits by THE HELLENIC REPUBLIC to citizens in Greece is not a commercial activity, but a governmental one. This is no different from acceptance of the idea that the provision of old age and survivor's insurance, disability insurance or medical insurance by the Social Security Administration in the United States is not a commercial activity here, but a governmental one. The activity does not become a commercial activity merely because it is necessary to contract for provision of medical services with providers, within or without Greece, who realize that they are not contracting with a private party on an unlimited free market basis.[12]

The Foreign Sovereign Immunities Act, 28 U.S.C., Section. 1602 et seq., itself provides little guidance in determining what is "commercial" as opposed to what activity is "governmental" in which case the foreign state is entitled to immunity under Section 1605, and the court has no jurisdiction over the parties or the matter. See *Texas Trading &*

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12 *Practical Concepts, Inc. v. Republic of Bolivia,* 615 F. Supp. 92, 94 (D.C. 1985), rev'd 811 F.2d 1543 (D.C. Cir. 1987) ("Since the commercial activity exception is rooted in the concepts of estoppel and reliance, it is reasonable to say that when a private party bargains for and agrees to accept the benefit of a state's exercise of its sovereign powers, that party should not be surprised when the state invokes its sovereign right of immunity")

Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981). Section 1603(d) provides that a commercial activity can be either a regular course of commercial conduct or a particular commercial transaction or act. The commercial nature of the activity is to be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

The Congressional history of the Foreign Sovereign Immunities Act indicates that Congress meant for the "essential nature" of behavior to be viewed, and, by not defining "commercial activity" with precision, gave the courts "a great deal of latitude" in interpreting the exception. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6615 (House Report). The essential difference between the position of Petitioners and Respondents is whether this Court should look extremely narrowly at the contract between MERKEL and the BANK and Petitioners, and ignore every fact other than the mere existence of that contract in a vacuum, or whether this Court is obligated to determine the nature of the course of conduct or particular transaction or act. If the narrow position is adopted, then almost all of the case law under the Foreign Sovereign Immunities Act is unnecessary, and the great latitude given to the courts in interpreting the commercial activities exception to the Foreign Sovereign Immunities Act is redundant.

If a foreign government enters into a contract to purchase goods and services, that will frequently be considered a commercial activity. See, e.g. Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 16, 27, 51 (1976); Hearings on H.R. 3493 before Subcommittee on Claims and Governmental Relations of the House Committee of the Judiciary, 93rd Cong., 1st Sess. 16 (1973). It is equally clear, however, that a contract for the purchase of goods or services is not inevitable

commercial activity. See *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987); Note, Establishing Jurisdiction Under the Commercial-Activities Exception to the Foreign Sovereign Immunities Act of 1976, 19 Hous. L. Rev. 1003 (1982).

The provision of health benefits to its citizens, within or without Greece, is a sovereign function. The reason any governmental health care benefit program is workable at all is that the government has full sovereign authority to obtain funds, taxes or contributions. It also has the authority to obtain funds, taxes or contributions. Further, it has the authority to schedule and limit benefits, an important authority for overall fiscal planning as well, because it is unable to limit covered persons to those in favorable insurability groups. Finally, it has the authority to cut program costs by limiting remedies against itself to administrative remedies, and limiting access to the courts to instances in which it does not follow its own laws, rules and regulations. The trust funds to pay benefits are carefully monitored, actuarily, to insure their short range and long range integrity. A judgment on the basis of quantum meruit or unjust enrichment, requiring payment of amounts far in excess of scheduled benefits or the contractual amount, would be a direct infringement on this sovereign authority.

Furthermore, there is no reason why the BANK and MERKEL, and therefore RUSH and SOUTH CHICAGO, should be treated any differently from hospitals and doctors located in Greece. The BANK and MERKEL, in contracting with THE HELLENIC REPUBLIC knew that they were not contracting with a private party, or on an unlimited free market basis. They knew that bills would have to be submitted to THE HELLENIC REPUBLIC, approved by it and paid by it. MERKEL and the BANK have both legal and administrative remedies against THE HELLENIC REPUBLIC OF GREECE to secure payment, upon providing full bills and backup information to it. RUSH and

SOUTH CHICAGO are not without a remedy through the courts or administrative procedure in Greece, by intervention in proceedings brought by MERKEL and BANK.

Another highly relevant question is "whether the activity in question is one which private persons ordinarily perform or whether it is peculiarly within the realm of governments." Hearings on H.R. 11315 before the Subcommittee on Administrative Law & Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 24 (1976). See, e.g., *Letelier v. Republic of Chile,* 748 F.2d 790 (2d Cir. 1984); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 309 (2d Cir. 1981).

Is the provision of health services by THE HELLENIC REPUBLIC to its citizens a governmental or commercial activity? Clearly, it is not an activity customarily carried on for profit, which is one characteristic of most commercial activity. E.g., *Letelier v. Republic of Chile,* 748 F.2d 790, 797 (2d Cir 1984). Indeed, the activity, because of its lack of limitations, could not be carried on for profit. The provision of Social Security benefits, including disability income, unemployment compensation, retirement pensions, funeral expenses, medical and health benefits, and other benefits to all of the eligible citizens of Greece is not a function which might be performed by a private party. No private party, without the assistance of governmental funds, can possibly afford to insure an entire population, without regard to limitation on risk groups, rates and insurance experience.[13]

This contract to perform the kidney transplants is not a profit making contract and it is not a contract which would be payable out of general funds of THE HELLENIC REPUBLIC. The contract is one small part of the exercise

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13 In spite of the discussion of this point herein, the law is also clear that not every act of a foreign state that could be done by a private citizen in the United States is thereby "commercial activity." See, e.g., *Letelier v. Republic of Chile,* 748 F.2d 790, 797 (2d Cir. 1984).

of its sovereign and legal obligation to provide medical and health care benefits to its citizens. Those benefits are paid pursuant to carefully scheduled benefit requirements, are paid out of limited and special trust funds, and are subject to limited court and administrative review, just as are the United States' Social Security, Medicare or Medicaid benefits. Parties within or without Greece do not contract with THE HELLENIC REPUBLIC or its agencies for these benefits on a private basis. Rather, they contract with a sovereign and with no expectation that they are contracting to provide medical services on an unlimited private basis.

The entry by THE HELLENIC REPUBLIC into a contract with MERKEL and the BANK was an exercise of its governmental functions. When a government enters into a contract in its sovereign capacity, then the breach of that contract partakes of the contract's initial sovereignty. *De Sanchez v. Banco Central De Nicaragua,* 770 F.2d 1385,1394 (5th Cir. 1985). That case involved looking at a particular transaction regarding the failure of the Central Bank of Nicaragua to honor a check. If the facts showed a sale of foreign currency, the transaction would be commercial. If, however, the same facts were the Bank's regulation of exchange rates, the transaction would be sovereign. Thus, in deciding the case, the court was required to look to the underlying purpose of the Central Bank's actions. In considering the statutory requirement that the court examine the "nature" of a transaction rather than its "purpose" the court stated:

> "We do not interpret this provision, however, to bar us totally from considering the purposes of different types of activities. Indeed we do not believe that an absolute separation is always possible between the ontology and the teleology of an act. Often the essence of an act is defined by its purpose -- gift giving, for example. Unless we can inquire

into the purposes of such acts, we cannot determine their nature." 770 F.2d at 1393

The court found that the Central Bank's purpose in selling dollars, which was to regulate its foreign exchange reverses, was not ancillary to its conduct, but instead defined the conduct's nature. Therefore, the Government of Nicaragua was entitled to sovereign immunity.[14]

That case is similar in many ways to this one. The payment to MERKEL and the BANK for medical services performed for Greek citizens is an intrinsic governmental function of THE HELLENIC REPUBLIC. One of the main purposes of the Ministry of Health, IKA and OGA is to provide Social Security and health care benefits to citizens of Greece. Their doing so is not ancillary to their conduct in entering into the contract with MERKEL and the BANK for the provision of certain medical services to Greek citizens; instead, it defines the conduct's nature. That nature is governmental.

The discretion Cong.ess has given to the courts in defining commercial activity is designed to allow this Court to avoid any strict mechanical test and to allow this Court to avoid any strict mechanical test and to do justice to the purpose of the Foreign Sovereign Immunity Act: to balance the interest of a private party to sue a sovereign government where a truly commercial transaction is involved, against the interest of the sovereign to determine its own governmental policies. See, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 703-04, 96 S. Ct. 1854, 1866, 48 L.Ed. 2d 301 (1976) which held, in a plurality opinion, that subjecting foreign governments to the rule of law in their commercial dealings presents a smaller risk of affronting their sovereignty than would an attempt to pass on the legality of

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14 See also *Chisholm & Co. v. Bank of Jamaica,* 643 F.2d 1393 (S.D. Fla. 1986) in which the Court states that the result in *DeSanchez* might have been different if the facts were different, i.e., if Nicaragua had not at that time been in extreme political and financial distress.

their governmental acts. This Court reasoned that foreign governments acting in their commercial capacities do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens. Therefore, subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "natural nerves."

In *International Association of Machinists v. Organization of Petroleum Exporting Countries,* 477 F. Supp. 553 (C.D. Ca. 1979), the Court, in a suit against OPEC for antitrust violations in the setting of oil prices, defined commercial activity as follows:

> "An act or activity can be defined broadly, such as "hiring of employees," an activity carried on by private parties, and thus, "commercial," or it can be defined narrowly, such as "employment of diplomatic, civil service, or military personnel," a governmental activity. It was suggested that in determining whether to define a particular act narrowly or broadly, the court should be guided by the legislative intent of the FSIA to keep our courts away from those areas that touch vert closely upon the sensitive nerves of foreign countries." 477 F. Supp. at 567.

There are several reasons why, if the District Court were to proceed to try this case, it would impinge strongly on intrinsically sovereign activities and "sensitive nerves" of THE HELLENIC REPUBLIC. First, it would throw an unknown and unforeseen variable into a government trust fund to pay scheduled benefits and would substitute the discretion of a foreign court for that of persons chargeable with administering the benefit programs of the Ministry of Health, IKA and OGA. The Director of the Branch of Health of OGA describes the impact as follows:

> . . .OGA is not permitted to pay any amount in excess of the one specified in the contract. Neither the Ministry of Health, nor any of the Public Law Entities, including IKA and OGA, pay medical bills, within or without the country, without limitation, and without full governmental approval (approval of the Council of State Comptrollers and the Body of the Certified Public Accountants). If the Government of Greece (the Greek State), the Ministry of Health, or any of the Public Law Entities paying health benefits, including IKA and OGA, could be compelled to pay, by the courts of any other country in which they were required to provide medical benefits for citizens, either because certain medical procedures were only available in those countries at the time medical services were required, without limitation or on another country's court's idea of unjust enrichment or the doctrine of the reasonable value of the rendered services (quantum meruit), then the funding structure of the Ministry of Health and the Public Law Entities, providing health care and other public group insurance benefits, would be seriously put in jeopardy. . . .(J. App. 12, sub-T. D, pp. 641-642) (See also, sub-T. F, pp. 653-654)

In a case which is not otherwise relevant to the facts of this case, *Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger,* 376 F. Supp. 1099 (S.D. Fla. 1974), the Court stated:

> "Sovereign immunity governs" if, 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of the judgment would be 'to restrain the government from acting, or to compel it to act.'" Id. at 1112

A second reason why the District Court's proceeding with trial of this case would impinge on the sovereignty or "sensitive nerves" of THE HELLENIC REPUBLIC is that RUSH and SOUTH CHICAGO would be granted a substantive basis for recovery which they would not have in Greece. What would happen in Greece, if this contract were carried out in the normal course of events, is that the BANK and MERKEL would have performed kidney transplants on Greek nationals sent to the Unties States for that purpose, pursuant to the terms of the contract. MERKEL and the BANK would then have submitted bills, including their fees, bills of hospitals, labs, etc. to the Ministry of Health, IKA or OGA. The Ministry of Health, IKA or OGA would pay the bills, or request additional back-up information, or information on medical necessity or medical complications, if they deemed such information necessary, prior to making a decision payment of the bills. THE HELLENIC REPUBLIC would then pay MERKEL and the BANK an amount it determined proper, based on the bills and other information provided. MERKEL and the BANK would then pay the persons with whom they dealt.

If MERKEL and the BANK were unhappy with THE HELLENIC REPUBLIC's decision on payment of their bills, they would have certain administrative remedies, and a legal remedy, only if the Ministry of Health, IKA or OGA somehow failed to follow their own laws, rules and regulations. In the latter event, the verdict of a court would not be for any amount of money, but would rather be to remand the proceedings to the administrative agencies with instructions to follow the law, rules and regulations.[15] RUSH and SOUTH CHICAGO, could intervene in proceedings between MERKEL and the BANK and THE HELLENIC REPUBLIC, IKA and OGA to justify the hospital portion of MERKEL and the BANK's bills. What they would most

15 This proceeding would not be dissimilar to a challenge to any ruling by our Social Security Administration on benefits.

certainly have, however, are the rights they have here, namely, the right to proceed directly against MERKEL and the BANK here or in Greece, at the source of MERKEL and the BANK's funds, for breach of MERKEL and the BANK's contract with them.

The District Court may decide this dispute before the appropriate officials of the Ministry of Health, IKA or OGA have exhausted their responsibilities to decide it. This would certainly impinge upon the sovereignty of Greece. As a corollary, if those officials make a decision before the District Court does, the District Court will be asked to review the validity of the public acts of a sovereign state performed within its own territory. Put a different way, the District Court would be asked to sit in administrative review of the acts of the Greek Ministry of Health, IKA and OGA. Cf. *Callejo v. Bancomer, S.A.* 764 F.2d 1101, 1113 (5th Cir. 1985). The District Court should not be permitted to impinge on the sovereignty of a foreign nation before its administrative procedures have even been exhausted and also should not review them afterwards.

As the foregoing demonstrates, there is no way to separate the contract for performance of the kidney transplant operations from the governmental activity of providing health care benefits to Greek citizens. The two are inextricably intertwined. Any judgment by the District Court in this case will inevitably interfere with the sovereign functions of Petitioners. To avoid such interference and infringement upon sovereignty, the entry into the contracts to perform the kidney transplant operations must be held to be a governmental, non-commercial activity.

VIII. CONCLUSION

For the compelling reasons stated above, Petitioners request that a Writ of Certiorari be issued to resolve this important question of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2663

RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, THE CHICAGO REGIONAL ORGAN AND TISSUE BANK, DR. FREDERICK K. MERKEL, JUNE D. BAJOR and SOUTH CHICAGO COMMUNITY HOSPITAL,

Plaintiffs-Appellees,

v.

THE HELLENIC REPUBLIC, a Foreign Country, THE HELLENIC REPUBLIC NATIONAL AGRICULTURAL INSURANCE INSTITUTE, a Greek Institution, and THE SOCIAL INSURANCE INSTITUTE OF GREECE, a Greek Institution,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 2021—James B. Moran, *Judge.*

ARGUED APRIL 14, 1989—DECIDED JUNE 14, 1989

Before CUDAHY, POSNER and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The principal issue in this appeal is whether the Greek government's execution of a contract to reimburse physicians and an organ bank for the costs of kidney transplants performed on Greek nationals constitutes a "commercial activity" under the Foreign Sovereign

Immunities Act of 1976 ("FSIA' or "the Act").[1] The district court held that the Greek government's execution of the contract constituted a "commercial activity," and therefore the defendants were not immune from suit under the exceptions to sovereign immunity contained in the Act. *Rush-Presbyterian-St. Luke's Medical Center v. The Hellenic Republic*, 690 F. Supp. 682 (N.D. Ill. 1988). The defendants appeal; we affirm.

I.

Under the Greek constitution, the government has a broad obligation to provide health care services to Greek citizens. Apparently, kidney transplants are not widely performed in Greece; in order to fulfill its constitutional mission to provide medical services to Greek nationals, the Greek government entered into a contract with Dr. Frederick Merkel, June Bajor and the Chicago Regional Organ and Tissue Bank in December, 1983. The agreement was negotiated in Greece, but executed in the United States. The contract provided that the Greek government would send its citizens to Chicago for transplant operations at local hospitals. The estimated cost for the transplant operations was $35,000; however, the contract stated that "these costs are not secure" and that additional charges might arise due to unforeseen complications in a patient's treatment. Bills for medical costs were to be submitted to the Greek consulate in Chicago; the contract also provided that the Greek government would maintain an account at a local bank in order to pay for the services rendered.

Several kidney transplants governed by the contract were performed at Rush-Presbyterian-St. Luke's Medical Center and South Chicago Community Hospital. After performing

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[1] Pub. L. No. 94-583, 90 Stat. 2891, *codified at* 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), and 1602-1611.

the medical services in question, Rush and South Chicago submitted to the organ bank bills ostensibly based on their costs. The organ bank in turn submitted the bills for payment to the Greek government. Apparently, the bills submitted by Rush and South Chicago were substantially higher than the Greek government had anticipated, or were not properly documented; as a result, only partial payment was made, leaving an outstanding, unpaid balance of $346,915.81 owing to Rush-Presbyterian and approximately $203,219.48 to South Chicago.

Rush filed the present suit on March 24, 1986, seeking to recover the balance owed for the kidney transplants under theories of breach of contract and *quantum meruit*. Dr. Merkel, Bajor and the organ bank, the parties to the contract with Greece, were later added as involuntary parties-plaintiff. In January, 1987, South Chicago successfully moved to intervene in the case; its complaint in intervention also sought recovery based on contract and *quantum meruit* theories.

The district court denied the defendants' motions to quash the summons and dismiss the complaints on July 11, 1988. *Rush-Presbyterian-St. Luke's Medical Center v. The Hellenic Republic*, 690 F. Supp. 682 (N.D. Ill. 1988). The court found that Greece's execution of the contract was a commercial activity, since "[t]he essence of the contract here was the exchange of money for kidney transplant services," an activity which private parties could perform, whatever the purposes for which Greece had entered this particular transaction. *Id.* at 685-86. The court also held that the transaction bore a sufficient connection to the United States to support subject matter and personal jurisdiction, since "[t]he transplants were performed, payments for them collected and documentation of these transactions presented in the United States." *Id.* at 686. The court additionally noted that the plaintiffs had allegedly suffered a direct financial injury

in the United States due to Greece's breach of contract. *Id.* For these reasons, the court found that sovereign immunity did not bar the suit under the "restrictive theory of sovereign immunity" codified in the FSIA. Greece appeals.[2]

II.

Plaintiffs concede that the defendants are either foreign states or instrumentalities of foreign states as those terms are employed in the FSIA. 28 U.S.C. § 1603(a), (b). Therefore, in order for the defendants to be amenable to suit in a United States court, their conduct must fall within one of the exceptions to sovereign immunity contained in the Act. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 (1983).

In what remains one of the leading decisions interpreting the FSIA, Judge Irving Kaufman noted that "[i]n structure, the FSIA is a marvel of compression." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 306 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). However, as Judge Kaufman also observed, "[t]his economy of decision has come [ ] at the price of considerable confusion," *Id.* at 307; *see also Gibbons v. Adaras na Gaeltachta*, 549 F. Supp. 1094, 1105, 1106 (S.D. N.Y. 1982) (characterizing FSIA as "remarkably obtuse," a "statutory labyrinth [with a] bizarre structure and [ ] many deliberately vague provisions"). Fortunately, in the eight years since the *Texas Trading* decision, many difficult interpretive questions have been answered; our resolution of the current appeal is accordingly a fairly straight-forward matter.

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[2] Since sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits, the denial of a claim of sovereign immunity is an immediately appealable interlocutory order under the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949). *See Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987).

The FSIA provides that

> The district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a). Thus subject matter jurisdiction over a foreign state is expressly conditioned on a finding that the defendant is not entitled to sovereign immunity. *Verlinden*, 461 U.S. at 493 ("subject matter jurisdiction in any [ ] action [against a foreign sovereign] depends on the existence of one of the specified exceptions to foreign sovereign immunity"). Insofar as relevant here, the FSIA provides that

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . .
>
> (2) in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605. The only definition of "commercial activity" contained in the Act states that

> A "commercial activity" means either a regular course of commercial conduct or a particular com-

> mercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). In order to determine whether the defendants are immune from suit, we must answer two related questions: (1) did the defendants engage in a "commercial activity" in the United States or abroad?; and (2) if so, does this activity bear a significant relation to the United States, and is plaintiffs' action "based upon" the defendants' commercial activity? It is to these questions we now turn.

A.

As a number of other courts have recognized, the definition of "commercial activity" in the FSIA is not especially helpful, and is in fact somewhat circular. "Commercial activity" is defined by reference to "commercial conduct" and "commercial transaction[s] or act[s]." Yet nowhere in the Act's text or legislative history is the crucial term "commercial" defined. It appears from the FSIA's legislative history that the term "commercial" was deliberately left undefined; Congress placed its trust in the courts to develop, through an evolving body of case law, a workable definition of a "commercial activity."[3]

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[3] *See Segni v. Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987) ("Congress intended to afford the federal courts 'a great deal of latitude in determining what is a "commercial activity"'"); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987); *Transamerica S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 n.7 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Texas Trading*, 647 F.2d at 308-09 (Congress "put [its] faith in the U.S. courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental").

An important starting point in determining whether a particular transaction or course of conduct constitutes "commercial activity" is the Act's admonition that the court look to the conduct's *nature*, rather than its *purpose*. Certainly, "nature" and "purpose" do not demark hermetically sealed, separate domains; "[o]ften, the essence of an act is defined by its purpose." *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393 (5th Cir. 1985). However, while "nature" and "purpose" may not be neatly separably concepts in all cases, this court has stressed that "the command of Congress embodied in 28 U.S.C. § 1603(d) requires that we confine any consideration of purpose as closely as we can, considering that purpose *only so far as is absolutely necessary* to define the nature of the act in question." *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987) (emphasis added); *see also Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1023 (9th Cir. 1987) (while FSIA directs courts to look to nature of activity rather than purpose, "the purpose of an act may be *relevant* in defining its nature") (emphasis original), *cert denied*, 108 S. Ct. 1077 (1988).

In determining the nature of the foreign state's action, an important inquiry is whether a private person could have engaged in similar conduct. If a private person could have engaged in the same *type* of activity, then the sovereign has presumptively engaged in "commercial activity" within the meaning of the FSIA; however, if no private party could have engaged in the challenged conduct, then the conduct is a sovereign act, and the foreign state is immune from suit.[4]

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[4] *See Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988); *Segni*, 835 F.2d at 164 ("for FSIA purposes [the nature of a transaction] may be divined by asking whether a similar agreement could have been entered into with a private party"); *Joseph*, 830 F.2d at 1024 ("if the role of the sovereign is one which might be played by a private actor," the activity is commercial); *Meadows v. Dominican Republic*, 817

(Footnote continued on following page)

As the legislative history of the FSIA reveals, contracts for the purchase or sale of goods or services are presumptively "commercial activities." *Segni*, 835 F.2d at 163 ("[c]ontracts for the purchase of goods or services . . . ought normally to be considered commercial"); *Practical Concepts*, 811 F.2d at 1549 (a contract between a foreign state and a private party for the purchase of goods and services 'may presumptively be,' but is not inevitably, 'commercial activity'"). However, certain contracts, although generally of a type in which a private person could enter, are by their nature governmental, since only a sovereign entity deals in the particular kind of goods or services. For example, although a private party could not allow another to exploit the animal or mineral resources on the former's land (to the extent permitted by local law), a contract whereby a foreign state grants a private

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F.2d 517, 523 (9th Cir.), *cert. denied*, 108 S. Ct. 486, 487 (1987); *Practical Concepts*, 811 F.2d at 1549; *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 825 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108 n.6 (5th Cir. 1985); *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 n.7 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1408-09 (E.D. Va. 1988).

In *Letelier v. Republic of Chile*, 748 F.2d 790, 797 (1984), *cert. denied*, 471 U.S. 1125 (1985), the Second Circuit approved the "private person" test, but also suggested that, in order to determine whether a foreign state has engaged in a commercial activity, the court must "search[ ] for evidence of a profit motive on the foreign sovereign's part." We cannot accept this parsing of the term "commercial activity." As noted by the Ninth Circuit in *Joseph*, "the use of profit motive as a threshold requirement for applying the commercial activity exception would be inconsistent with the FSIA's focus on the nature of the transaction rather than its purpose." 830 F.2d at 1024. Moreover, since foreign sovereigns often enter the commercial marketplace with no intention of making a profit thereby, (for example, to purchase supplies to outfit the nation's military), *Letelier's* suggestion would virtually eliminate the "commercial activity" exception to sovereign immunity.

party a license to exploit the state's natural resources is *not* a commercial activity, since natural resources, to the extent they are "affected with a public interest," are goods in which only the sovereign may deal.[5] Further, while private persons routinely enter employment agreements, employment contracts between a foreign state and its civil servants, diplomats or military personnel are not "commercial" transactions, since the employment of such personnel is intimately con-

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[5] *See, e.g., MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir.) (government's grant of license to capture and export rhesus monkeys for scientific experimentation *not* a commercial activity, since the agreement "concerned Bangladesh's right to regulate its natural resources, [ ] a uniquely sovereign function"), *cert. denied*, 469 U.S. 1037 (1984); *International Ass'n. of Machinists v. Organization of Petroleum Exporting Countries (OPEC)*, 477 F. Supp. 553, 567-69 (C.D. Cal. 1979) (foreign governments' participation in cartel to regulate price and supply of crude oil *not* a commercial activity, since it involves regulation of the exploitation of a natural resource), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

In a related vein, the Fifth Circuit has held that the sale of foreign exchange by a government-owned and operated central bank constituted a "governmental", rather than "commercial", activity. *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393-94 (5th Cir. 1985). Although sales of foreign exchange, even by government-run financial institutions, are normally commercial acts, the Fifth Circuit held, on the particular facts before it, that the central bank's actions were integrally related to the bank's sovereign function of rationing Nicaragua's limited reserves of foreign currency in order to avert an economic crisis. To the extent that *De Sanchez* hinged on the fact that foreign exchange was a scarce commodity in post-revolutionary Nicaragua, and that the central bank's function was to safeguard this resource in the public interest, we believe that the case was correctly decided. *Cf. Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1110 (5th Cir. 1985) (sale of foreign exchange by government-owned bank a "commercial activity" where bank had no special role in formulating or implementing government's exchange-control policy). However, to give the "commercial activity" exception its proper scope, *De Sanchez* must be limited to the extraordinary circumstances before the court in that case.

nected with the foreign state's formulation and execution of government policy.[6]

Other activities undertaken by a foreign state, although generally resembling conduct routinely engaged in by private parties, may also be labeled "governmental" and immune from suit under the FSIA. For example, although private entities often rehabilitate buildings to serve as office space, a foreign state's remodelling and operation of a chancery building is not a "commercial" act, since the construction and operation of a diplomatic office are peculiarly sovereign

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[6] The House Report on the FSIA specifically notes that "the employment of diplomatic, civil service, or military personnel" is a "public or governmental," rather than commercial, activity. H. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615. *See also Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 550 (D.C. Cir. 1981) (allegation that international organization interfered with plaintiff's provision of legal services to organization's employees involves governmental function, since plaintiff's claims "arise from the PAHO's supervision of its civil service personnel and from its provision and allocation of office space"); *Broadbent v. Organization of Am. States*, 628 F.2d 27, 34-36 (D.C. Cir. 1980) (wrongful discharge claims by members of "the internal administrative staff" of international organization do not arise out of "commercial" transaction).

In *Segni v. Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987), this court found that an employment agreement between a foreign state and a private party for the provision of public relations services constituted a "commercial activity" under the FSIA. However, our opinion was careful to note that the plaintiff "had no role in the creation of government policy or its administration; rather, he simply carried it out. There is no indication in the record that he was so supervised or monitored by the [foreign state], or so privy to its political deliberations, as to be considered a part of the Spanish government, as a civil servant or diplomat would be." *Id.* at 165.

activities. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 920 & n.2 (D.C. Cir. 1987).[7] And, while private entities may certainly publish libelous statements (and sometimes with frequency), another court has held that allegedly libelous statements contained in the periodical *Izvestia* were made in the course of a governmental activity, since *Izvestia* is "the voice of an official Soviet agency." *Gregorian v. Izvestia*, 871 F.2d 1515, 1522 (9th Cir. 1989).

These cases illustrate that a court faced with a claim of immunity must be sensitive to the particular facts of the case before it. If the transaction in question involves a type of good or service in which only a sovereign could deal, then the foreign state's assertion of sovereign immunity should be upheld. However, if private parties could engage in an identical transaction, then the activity is "commercial", and sovereign immunity is not an obstacle to suit. In order to draw the fine distinction between "commercial" and "governmental" actions, the court must disregard the scope of the particular transaction at issue. Thus it is irrelevant that no private person has ever purchased a million pairs of army boots, or a million tons of cement, in a single transaction. The

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[7] The *MacArthur Area Citizens Association* case can profitably be compared with *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018 (1987), in which the Ninth Circuit held that a foreign state was not immune from suit for damages allegedly caused to a residence leased by the state for its consular personnel. In the former case, the D.C. Circuit emphasized the unique considerations involved in the construction and operation of a chancery building—security and communications needs, heavy traffic flows, etc. These considerations are foreign to the construction and operation of private, commercial office space; therefore Peru was immune from suit for its alleged creation and maintenance of a nuisance. In *Joseph*, however, the building occupied by Nigerian consular personnel was simply employed as a residence. Since private employers often lease residential space for their employees, and Nigeria's execution of the lease and occupancy of the residence were identical to a private-sector transaction, the transaction was characterized as "commercial".

important question is whether private parties purchase cement or boots, which they clearly do. The court should also carefully focus on the *specific* conduct at issue in the case before it, rather than the broad program or policy of which the individual transaction is a part. For example, in *Segni* this court defined the activity underlying the suit as "a contract under which [the plaintiff] would provide services in the area of product marketing," rather than, more broadly, "the promotion of Spanish exports to bolster the Spanish economy," even though the contract for public relations services was clearly part of a larger government program to promote exports of Spanish wine. 835 F.2d at 165.[8] Moreover, the court should concentrate on the "basic exchange" embodied in the contract, rather than subsidiary provisions (tax exemptions, waiver of import duties, etc.) to which only a sovereign nation could agree. *Practical Concepts*, 811 F.2d at 1548-50; *Tifa Ltd. v. Republic of Ghana*, 692 F. Supp. 393, 401 (D.N.J. 1988) ("exemption from import

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[8] As the Fifth Circuit has explained, "[t]he focus of the exception to immunity recognized in § 1605(a)(2) is not on whether the defendant generally engages in a commercial enterprise or activity . . .; rather, it is on whether the particular conduct giving rise to the claim in question constitutes or is on connection with commercial activity, regardless of the defendant's generally commercial or governmental character." *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980); *see also, e.g., Transamerican S.S.*, 767 F.2d at 1003 (describing defendant's actions as "essentially those of a collection agent," rather than those "of a foreign sovereign diplomatically attempting to maintain friendly relations" by mediating commercial dispute between American and foreign entities); *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1408-09 (E.D. Va. 1988) ("proper application of the 'private party' test requires a sharp and accurate focus on the specific activity in question"); *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 294 (S.D.N.Y. 1987) (noting that immunity issue could hinge on whether conduct in question is the general "nationalization of a financially troubled private bank," or "the specific repudiation of [the nationalized bank's] financing agreement with plaintiffs").

duties . . . ancillary to the alleged promise" forming the gravamen of plaintiff's complaint).

The defendants argue that the "commercial activity" exception to sovereign immunity does not apply to their conduct, since "the provision . . . of Social Security and health benefits by THE HELLENIC REPUBLIC to citizens in Greece is not a commercial activity, but a governmental one." In the defendants' estimation, "[t]he contract is but one small part of the exercise of [Greece's] sovereign and legal obligation to provide medical and health care benefits to its citizens." The defendants also note that the provision of health care services by a government to its citizens is not normally carried on for profit, and that "[n]o private party can possibly afford to insure an entire population." The Greek government also argues that no private insurer would be able to insist that an administrative proceeding serve as the exclusive avenue for resolution of claims disputes, nor would a private insurer be able to turn to general treasury funds, raised by taxes on the entire populace, in order to finance its operations.

We cannot accept Greece's arguments. Its first contention, that the contract can only be viewed as one small part of the Greek government's fulfillment of its constitutional obligation to provide for the health of its people, is not persuasive. This argument impermissibly departs from the "nature" of Greece's conduct, and instead focuses primary attention on the "purpose" for which Greece entered this particular agreement. The purpose behind the defendants' execution of the kidney transplant contract is irrelevant to the immunity question. Rather than look to the purpose of the agreement, we must ask whether private parties ever enter contracts to reimburse health care providers for medical services performed on third parties, *assuming* that the private party has a preexisting obligation to attend to the third parties' medical needs. It is clear that private parties in

the United States enter such agreements routinely. Employers, health maintenance organizations and private insurers often enter into agreements with health care providers for the provision of medical services which the private party is obliged to provide to a third party but which the private party is not itself capable of performing. Whether the obligation to provide these services arises from the relation of government to citizen, or employer to employee, or insurer to insured is simply irrelevant—the "basic exchange" of money for health care services is the same in each context. We decline to focus exclusively, for purposes of determining immunity, on the *purpose* for which Greece happened to enter this particular transaction.

Greece's argument that its activity cannot be commercial because it did not enter this particular transaction for profit also misses the mark. As we explained above, *supra* note 4, although some courts may have suggested otherwise, we do not believe that a foreign sovereign must intend to generate a profit from the particular transaction in order for its activities to be "commercial". Greece's argument that no private insurer could afford to insure an entire nation is also meritless, since it focuses on the *scope* of the transaction, rather than its nature. While private parties may undertake to insure only ten, or ten thousand, individuals, and the Greek government may insure ten million, the transactions partake of an identical "nature"—namely, the agreement to reimburse a health care provider for the costs of performing medical services for a third party. Finally, we reject Greece's argument that its activity is not commercial because no private insurer could levy taxes on an entire population in order to finance its insurance operation, nor could any private party enforce an exclusive administrative remedy for claims disputes. The source of funds to finance a particular transaction is irrelevant to the transaction's essential nature. Moreover, the administrative trappings which may surround Greece's reimbursement scheme are ancillary to the "basic

exchange" at issue here—an undertaking to reimburse for health ca.e services performed.

In short, none of Greeee's arguments persuade us that the kidney transplant agreement is of a peculiarly governmental nature. There is nothing about the provision of the payment for health care services which is uniquely governmental. Assuming a preexisting duty to provide health care to others, private parties often enter contracts with health care providers to reimburse the providers for the reasonable costs of performing medical services. Therefore, we hold that Greece's execution of the contract at issue in this case constituted "commercial activity" within the meaning of the FSIA. The only remaining question is whether the present suit is "based upon" commercial activity bearing a substantial relationship to the United States.

B.

Greece argues quite vehemently that, even if it was involved in a "commercial activity," that activity did not take place in the United States. We need not resolve the question whether the defendants, either personally or through their agent, the Greek consulate, engaged in "commercial activities" in the United States. For whatever the correct answer to this question, it is clear that the defendants engaged in a commercial activity (somewhere) which "cause[d] a direct effect in the United States" under the third clause of section 1605(a)(2).

Certainly, the effects of a foreign state's conduct on persons in the United States may not be "purely fortuitous"; instead, to support jurisdiction under the FSIA the domestic effects of a foreign state's actions must be "substantial" and "direct and foreseeable." The fact that an American corporation or individual has suffered financial injury due to the foreign state's actions may not be sufficient to establish FSIA

jurisdiction unless the foreign state has performed some "legally significant act" here.[9] In this case, we believe that the defendants' commercial activities did cause a direct effect in the United States. The defendants' concede that the contract was executed in the United States, and the transaction has allegedly caused financial injury to American entities. Moreover, at the defendants' instance, the plaintiffs performed kidney transplant operations in Chicago. *Cf. Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C. Cir. 1985) (finding a "direct effect" where, at defendant's direction, "a significant transaction was effectuated in the United States"). The contract specifically provided that claims for reimbursement were to be submitted to the Greek consulate in Chicago, and payments were to be made from an account at a local bank, which the contract specifically required the defendants to establish and maintain. *See Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.) (finding "direct effect" based on financial injury to American residents and fact that payments under contract to be collected in the United States), *cert. denied*, 108 S. Ct. 486, 487 (1987). Whether or not these considerations would be independently sufficient to establish "direct effects" jurisdiction, we have no doubt that, in the aggregate, these factors

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[9] *See, e.g., Gregorian v. Izvestia*, 871 F.2d at 1527 ("to establish a 'direct effect' in the United States resulting from an act occurring abroad, a plaintiff must establish that 'something legally significant actually happened in the U.S.'") (quoting *Zedan v. Kingdom of Saudia Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988)); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453 (6th Cir. 1988); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111 (5th Cir. 1985); *Maritime Int'l & Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982) (financial loss to American corporation, standing alone, does not establish a "direct effect" in the United States), *cert. denied*, 464 U.S. 815 (1983); *Tifa Ltd. v. Republic of Ghana*, 692 F. Supp. 393, 402-04 (D.N.J. 1988) (finding "direct effect" based on financial loss to United States corporation, together with fact that goods manufactured in United States).

abundantly support jurisdiction under the third clause of section 1605(a)(2).

The defendants also suggest, somewhat obliquely, that plaintiffs' *quantum meruit* claims are not "based upon" the defendants' execution of the kidney transplant contract. The defendants are correct that *quantum meruit* recovery may be available without reference to any underlying contractual agreement. However, while *quantum meruit* is a "non-contractual" basis for recovery, it is clear that the *quantum meruit* claims in this case are related to the execution and performance of the contract. This is sufficient under the FSIA, which merely requires that the plaintiff's claims possess an identifiable nexus to the defendant's commercial activity.[10] Further, it is immaterial that the plaintiffs were not themselves parties to the defendants' commercial activities; whether the plaintiffs have enforceable third-party claims

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[10] *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1360 (9th Cir. 1988) (per curiam); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988) ("there must be a connection between [the defendant's commercial] activity and the act complained of in the lawsuit"); *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13 (2d Cir.) (tort claim arising out of airline crash in China "based upon" defendant's commercial act of selling plaintiff's decedent airline ticket in United States), *cert. denied*, 108 S. Ct. 453 (1987); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985); *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerrienne de Navigacion*, 730 F.2d 195, 200-03 (5th Cir. 1984) (noting differing approaches to proper construction of "based upon"; concluding that action "based upon" commercial activity where there is "a nexus between [defendant's] commercial activity in the United States and [plaintiff's] grievance"); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Gemini Shipping, Inc. v. Foreign Trade Org.*, 647 F.2d 317, 319 (2d Cir. 1981); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273 (3d Cir. 1980); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 681 F. Supp. 371, 382-84 (N.D. Miss. 1988); *Tote v. Iberia Int'l Airlines*, 649 F. Supp. 41, 42-43 (E.D. Pa. 1986) (where plaintiff's decedent, an American resident, died on domestic Spanish flight for which tickets purchased in Spain, tort claim not "based upon" airline's unrelated commercial activities in United States).

against the defendants goes to the merits of plaintiffs' claims, rather than the preliminary question whether the allegations in the complaint are "based upon" defendants' commercial acts. *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983) (Friendly, J.).

At several points in its appellate brief the defendants emphasize that domestic (Greek) providers of health care services under contract with the Greek government must submit their invoices for administrative review by government agencies, and are reimbursed only for services rendered based on fee schedules contained in Greek administrative regulations. Defendants argue that it would be inequitable to allow the plaintiffs here to circumvent this complex administrative scheme for physician reimbursement by filing suit directly in an American court. The government contends that affirmance of the district court "would [ ] grant[ ] to [plaintiffs-appellees] [ ] a substantive basis for recovery which they would not have in Greece."

Our finding that Greece is not immune from suit does not prejudge any choice of law question which Greece may wish to assert on remand. Certainly, it is conceivable that the district court may be persuaded to apply Greek law, and specifically the Greek regulations governing physician reimbursement, to this transaction. More broadly, we would respond to Greece's concerns over the applicable law and appropriate forum by noting that the Greek government could have specified in its contract with Merkel, Bajor and the organ bank that Greek law would apply to any dispute arising out of the agreement, and that the parties could only resort to a Greek administrative or judicial forum in order to assert rights founded on the contract. Within broad limits, such choice of law and forum selection clauses are enforced

by American courts.[11] Of course, if such choice of law or forum selection clauses had been suggested by the defendants, plaintiffs may have demurred, or sought some other concession as a *quid pro quo*. This is the result intended by the FSIA—the rights and remedies of contracting parties should be specified explicitly in the contract, so that the parties may intelligently evaluate the bargain in all its aspects.

III.

Based on the foregoing, we find that the defendants engaged in a "commercial activity" and, whether or not the defendants' acts were performed here, the plaintiffs' claims are "based upon" a commercial activity having a "direct effect" in the United States. The defendants are therefore not entitled to immunity under the FSIA.

The judgement of the district court is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] *See, e.g., The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (forum selection clause should be enforced, especially in context of international commercial agreement, unless party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching"); *Weidner Communications, Inc. v. H.R.H. Prince Bandar al Faisal*, 859 F.2d 1302, 1309 (7th Cir. 1988) (same); *Checkers, Simon & Rosner v. The Lurie Corp.*, 864 F.2d 1338, 1344-45 (7th Cir. 1988) (Illinois law; contractual choice of law clause will be enforced so long as "reasonable").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, et al.,

Plaintiffs,

vs.

No. 86 C 2021

THE HELLENIC REPUBLIC, a foreign country, et al.,

Defendants.

MEMORANDUM AND ORDER

Rush-Presbyterian-St. Luke's Medical Center (Rush) and South Chicago Community Hospital (South Chicago) brought suit seeking the payment of medical bills for kidney transplants provided in their facilities to Greek nationals by Chicago Regional Organ and Tissue Bank (CROTB). CROTB and two staff members were joined as involuntary plaintiffs.

Defendants move to quash summons and dismiss the case on the ground that they are immune from suit under the Foreign Sovereign Immunities Act (FSIA), 22 U.S.C. §§1330, 1602-1611. Rush and South Chicago assert that because defendants, in contracting for the transplants, engaged in commercial activity carried on in and having a direct effect on the United States, they are amenable to suit under the FSIA. We agree and deny the motion.

FACTS[1]

In December 1983 CROTB, through its president, Dr. Merkel, and June Bator, its director of development, contracted with defendants to perform operations on Greek nationals in Chicago under an "International Kidney Transplant Programme" (Rush cplt. exh. A). The contract included estimated costs of the transplant procedures (Rush cplt. exh. A). Defendants agreed to "assume responsibility of all the expenses of "surgery for certain patients once CROTB sent them the relevant itemized bills (Rush cplt. exh. B). CROTB subsequently entered into agreements with Rush and South Chicago, whereby the hospitals would admit Greek transplant patients and CROTB would obtain from defendants and disburse to plaintiffs payment for the medical services (Rush cplt. ¶7). The parties do not dispute that the contract was negotiated in Greece and executed and performed in the United States. They further agree that the paper work for the transplants, including bills, statements and payments, was "funneled through" the Greek consulate in Chicago. Finally, it is not contested that defendants made payments to plaintiffs for the transplants through the American National Bank in Chicago.

CROTB performed transplants on those Greek nationals who had obtained defendants' approval at Rush and South Chicago in 1983 and 1984. CROTB submitted bills to defendants for plaintiffs' treatment of the patients (Rush cplt. exh. C). Defendants, claiming that the costs estimated by

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1 Though defendants do not so specify in their motion, we conclude that they move to dismiss under Rule 12(b) (1) of the Federal Rules of Civil Procedure (lack of subject matter jurisdiction). To determine whether a 12(b) (1) dismissal is appropriate, we are not confined by the pleadings but review all evidence submitted by both parties on the issue of jurisdiction. See *Western Transportation Co. v. Couzens Warehouse*, 695 F.2d 1033, 1038 (7th Cir. 1982).

CROTB in its agreement were binding and that CROTB had not adequately documented the bills, made partial payments for the services rendered but refused to pay the full amounts plaintiffs claimed were due. Rush claims defendants owe it $346,915.81 under the contract (cplt. ¶10), South Chicago asserts that it is owed approximately $203,219.48 (South Chicago resp. at 3); and CROTB seeks a balance of $5,995 (cplt. ¶9). All three complaints include a count in quantum meruit for the benefits conferred upon defendants.

Defendants now maintain that this court lacks jurisdiction to entertain this suit under the FSIA since in contracting with CROTB they were performing a governmental function. In an unsigned affidavit defendants assert that the Greek government provides health care for its citizens (Mousouri aff. exh. D at 2-3). They further assert that the medical benefit system in Greece is funded by the State in accordance with State guidelines and specific payments sought for services rendered must meet the approval of the Greek goverment (Mousouri aff. at 5). From the Greek government's regulation of health care, defendants conclude that they acted as a sovereign, and not in a commercial capacity, when they contracted with CROTB to provide the transplants for Greek citizens.[2]

DISCUSSION

I. Subject Matter Jurisdiction

Before 1952 this nation traditionally granted foreign countries complete immunity from suit in American courts. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch)

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2 It is noteworthy that defendants admit that the government's control of its citizens' health care "is generally excused by the entry into a contract, as in [this] case." (Def. mem. at 8.)

116, 136 (1812) (recognizing the "perfect equality and absolute independence of sovereigns"). The State Department announced the replacement of this absolute theory of sovereign immunity with the restrictive theory in 1952. Tate Letter, 26 Dept. of State Bull. 984 (1952) reprinted in *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682, 711-15 app. (1976). Under the restrictive theory public acts of foreign sovereigns are shielded from judicial scrutiny, but private acts receive no similar protection. *Segni v. Commercial Office of Spain,* 835 F.2d 160, 162 (7th Cir. 1987). The application of the new doctrine was left generally within the discretion of the State Department until Congress enacted the FSIA in 1976. See generally *Verlinden B. V. v. Central Bank of Nigeria,* 461 U.S. 480, 486-89 (1983).

The FSIA essentially codifies the restrictive theory of sovereign immunity, id. at 488, and gives the federal judiciary the responsibility of determining the extent to which particular actions of foreign states are immune from its power. The FSIA provides that, with certain enumerated exceptions, foreign states shall be immune from suit in federal and state courts. 28 U.S.C. §1604.[3] If one of the exceptions to the general grant of sovereign immunity applies, the FSIA confers subject matter jurisdiction on the district courts. 28 U.S.C. § 1330(a).

A. Commercial Activity

The exception at issue here, and the one that courts are most frequently asked to consider, is the "commercial ac-

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3 Specifically, 28 U.S.C. §1604, reads in pertinent part:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607 of this chapter.

tivity" exception appearing at §1605(a) (2), which provides in relevant part that

> (a) A foreign state shall not be immune from jurisdiction of the courts of the United States or of the States in any case --
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> * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign states; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States [.]

The requirement set forth in the three clauses of §1605(a)(2) ensure that a sufficient connection exists between the commercial activity in question and the United States. *Practical Concepts, Inc. v. Republic of Bolivia,* 811 F.2d 1543, 1549 n.12 (D.C. Cir. 1987); *Callejo v. Bancomer, S.A.,* 764 F.2d 1101,1110 (5th Cir. 1985).

To determine whether defendants are immune from suit under the FSIA we must answer the critical question: is the activity upon which the action is based properly described as "commercial" rather than "governmental." Congress, in the Act itself, has defined commercial activity as follows:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. §1603(d). Numerous courts have observed that the statutory definition, read in isolation, provides little guidance, e.g., *Segni,* 835 F.2d at 163, and is indeed "somewhat circular" since it defines "commercial activity" in terms of "commercial conduct" and "commercial transaction." *Callejo*, 764 F.2d at 1108 n.6. While the definition is broad, the Act does instruct us to consider the nature of the activity rather than its purpose. Congress did not further specify in the Act what it meant by the word "commercial." Rather, it "deliberately left the meaning open and ...'put [its] faith in the U.S. courts to work out progressively, on a case-by-case basis ... the distinction between commercial and governmental.'" *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 308-09 (2d Cir. 1981) (quoting Hearings on H.R. 11315 before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 53 (1976) (hereafter "Hearings") (testimony of Monroe Leigh, Legal Advisor, Department of State)), cert. denied, 454 U.S. 1148 (1982).

The legislative history of the Act narrows our focus somewhat. The FSIA House Report emphasizes "that an underlying public purpose will not provide a foreign state protection for an act which is private by nature." *Segni,* 835 F.2d at 163. Specifically, the Report, H.Rep. No. 84-1487, 94 Cong. 2d Sess. at 16, reprinted at 1976 U.S. Code Cong. & Ad. News 6604, 6615 (hereafter "Report"), states:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant, it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to provide provisions or equipment for its own forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to

make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

Contracts for the purchase of goods or services are described in several portions of the Report as activities that are generally considered commercial. The Seventh Circuit, and other circuits, have noted that the nature/purpose distinction does not draw as bright a line as would appear at first blush because the terms "nature" and "purpose" are not always easy to separate. See, e.g., *Segni,* 835 F.2d at 163-63; *DeSanchez v. Banco Central de Nicaragua,* 770 F.2d 1385, 1393 (5th Cir. 1985) (the purpose of the Nicaragua National Bank's sale of currency reserves, "defines the conduct's nature," and is not a subsidiary consideration).

Despite the difficulty in discerning clear definitions or directives from Congress, the relevant case law leads us to the conclusion that defendants' activities in contracting for the sale of medical services involving kidney transplants are properly considered commercial in nature. The contract into which Greece entered with plaintiffs is "of the same character as a contract which might be made by a private person." (Report at 615.) Defendants signed a contract providing that they would tender payments to plaintiffs for medical services rendered to Greek citizens in the United States. The contract included the estimated costs of such services and bills were sent itemizing these costs to defendants through the Greek consulate in the United States. While the purpose of the contract may have been to supplement the health care available to Greek nationals within the country itself, we consider the nature and do not refer to the purpose of the agreement. Defendants characterize a contract for the sale of army boots as a commercial activity. They then go on to contend that a contract for medical services is not a commercial activity because national provision of health care services is a not-

for-profit activity not normally performed by private persons and normally related to the exercise of a government's sovereign obligations. But that confuses the nature of the activity and its purpose. An army is not normally viewed as a profit center, at least not in modern industrialized nations, and the provision of armed forces to protect the state is looked upon as a fundamental sovereign obligation rather that the proper role of the private citizens. See *State Bank of India v. NLRB,* 808 F.2d 526, 535 (7th Cir. 1986). The essence of the contract here was the exchange of money for kidney transplant services and the fact that the money may have been derived from taxes levied on Greek citizens, or that all Greek citizens expect full health benefits, or that the contact may have been bigger in scope and ambition than the average contract entered into by two individuals, are auxiliary to the basic exchange and thus do not control our characterization of the activities. See *Practical Concepts,* 811 F.2d at 1550. Greece "enter[ed] into a contract to purchase goods and services [and has] avail[ed] itself of the ordinary contract machinery" by "bargain[ing] and negotiat[ing and] accept[ing] an offer. It enter[ed] into a written contract and the contract [was] to be [and was in part] performed." Hearings at 51. We thus conclude that defendants engaged in commercial activity within the meaning of §1605(a) (2).

B. Statutory Jurisdiction

The Supreme Court has noted that jurisdiction under the FSIA requires only "some form of substantial contract with the United States." *Verlinden,* 461 U.S. at 490. The FSIA authorizes the exercise of personal jurisdiction whenever subject matter jurisdiction exists under §1330(a) and service of process has been completed in accordance with §1608. 28 U.S.C. §1330(b). In other words, under the FSIA "subject matter jurisdiction plus service of process equals personal jurisdiction." *Texas Trading,* 647 F.2d at 308. Defendants do not dispute that service of process has been made pursuant

to §1608. The transplants were performed, payments for them collected and documentation of these transactions presented in the United States. In addition, plaintiffs have allegedly suffered a financial loss due to defendants' incomplete payment for services rendered under the contract. We find that these commercial activities were carried on in, and had a direct effect on, the United States, thereby meeting the jurisdictional requirement set forth in the first and third clauses of 28 U.S.C. §1605(a) (2) of the FSIA. See *Texas Trading,* 647 F.2d at 312.

II. Constitutional Jurisdiction

Defendants' contacts with the United States are sufficient to satisfy the due process clause. The contract was executed and performed in the United States. Defendants maintain a Greek consular office here, staffed with personnel responsible in part for recording and updating documentation of the services provided under the contract. Further, defendants used the American National Bank in Chicago to make payments under the contract. Since defendants acquired American supplies and services, paid for these services through an American office, using an American bank, and processed the paperwork pertaining to the payments and

services through its American consulate, their amenability to suit in this country should have been expected. Thus, any inconvenience that defendants may suffer by litigating in this country does not militate against our assertion of jurisdiction under the due process clause. See *Texas Trading,* 647 F.2d at 315.[4]

CONCLUSION

For the foregoing reasons, defendants' motion to quash the summons and dismiss the complaint is denied.

JAMES B. MORAN
Judge, United States District Court

July 11, 1988.

4 In a battle of allusions to Greek mythology and history, engaged in by some of the parties in their memoranda, defendants emerge the clear winners. With some trepidation this court enters the field to suggest that the respective parties are perhaps primarily concerned with being cast in the role of the Melians. Plaintiffs, fearful that the consequences will be governed by self-interest rather than justice, are loathe to submit to the power of Athens by seeking relief through some administrative proceeding in Greece. Defendants may fear the converse here. The present rulings, however, leave wholly open the merits of the dispute, which relate to the obligations, if any, to pay for services which may or may not have been performed, to pay amounts significantly in excess of those initially estimated, and to pay to plaintiffs amounts which may not be due to the involuntary plaintiffs.

89-498

No.

FILED
SEP 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE HELLENIC REPUBLIC, a Foreign Country, THE HELLENIC REPUBLIC NATIONAL AGRICULTURAL INSURANCE INSTITUTE, a Greek Institution, THE SOCIAL INSURANCE INSTITUTE OF GREECE, a Greek Institution,

Petitioners,

v.

RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER, THE CHICAGO REGIONAL ORGAN AND TISSUE BANK, DR. FREDERICK MERKEL, JUNE D. BAJOR, and SOUTH CHICAGO COMMUNITY HOSPITAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit properly affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division denying the Petitioners' Motion to Quash Summons and to Dismiss on the ground that the "commercial activity" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq.*, applies to this action arising out of a contract for medical goods and services.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed.[1]

[1] In compliance with Supreme Court Rule 28.1, Respondent Rush-Presbyterian-St. Luke's Medical Center states that it is a not-for-profit corporation and that it is affiliated with the following Hospitals and Colleges: Rush North Shore Medical Center, Copley Memorial Hospital, Bethany Hospital, Central DuPage Hospital, Christ Hospital and Medical Center, Elmhurst Memorial Hospital, Galesburg Cottage Hospital, Grant Hospital of Chicago, LaGrange Memorial Hospital, LaPorte Hospital, MacNeal Hospital, Marianjoy Rehabilitation Center, Miles Square Health Center, St. Mary's Hospital, Swedish Covenant Hospital, West Suburban Hospital Medical Center, Beloit College, Carleton College, Colorado College, Cornell College, Fisk University, Grinnell College, Illinois Benedictine College, Illinois Institute of Technology, Knox College, Lake Forest College, Lawrence University, Macalester College, Monmouth College, North Central College, Ripon College, Wheaton College.

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BRIEF IN OPPOSITION OF RESPONDENT RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 690 F.Supp. 682 (N.D. Ill. 1988). The opinion of the United States Court of Appeals for the Seventh Circuit is unreported at this time. Copies of the opinions of the District Court and Court of Appeals are contained in Petitioners' Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1989. The Petition for Writ of Certiorari was filed on August 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act is set forth in 28 U.S.C. §1602 *et seq.* The pertinent text of the Act is set forth in the Appendix.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals' decision, unanimously affirming the judgment of the District Court, is correct. There is no substantial federal question, no conflict in the Circuits and no other basis for further discretionary review by this Court.

1. PETITIONERS FAIL TO RAISE A SUBSTANTIAL QUESTION OF FEDERAL LAW.

Petitioners contend that this Court should grant a Writ of Certiorari because this case raises an important question of federal law. The important question of law proffered by Petitioners is "whether [Petitioners], in fulfilling their contractual and legal obligations to provide medical care to Greek citizens, exercised a governmental function or engaged in a commercial activity, as described in the Foreign Sovereign Immunities Act, by contracting to have kidney transplant operations performed upon [Greek] nationals in the United States". (Pet., p. 13).[2]

However, in determining whether there are special and important reasons for granting a Writ of Certiorari, this Court has stated that "this Court does not sit to satisfy a scholarly interest in such issues nor does it sit for the benefit of the particular litigants". *Rice v. Sioux City Memorial Park Cemetery, Inc., et al.*, 349 U.S. 70, 74, 99 L. Ed. 897, 75 S.Ct. 614 (1955). This Court in *Rice v. Sioux City* relied on the words of Mr. Chief Justice Taft:

---

[2] "Pet." refers to Petitioners' Petition for Writ of Certiorari and "Pet. App." refers to the Appendices of the Petition.

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

Rice v. Sioux City, *supra*, 349 U.S. at 79 quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The federal question of law proffered by Petitioners is one which would inure to their benefit only and which is not of importance to the public. For this reason alone, Petitioners Petition for Writ of Certiorari should be denied.

2. THE COURT OF APPEALS' DECISION COMPORTS WITH THE LANGUAGE AND PURPOSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE CASES DECIDED THEREUNDER.

Petitioners devote much of their Petition arguing the merits of the case (Pet. App. 16, 18, 20-23)—matters not relevant in the jurisdictional issue decided by the Seventh Circuit Court of Appeals. As stated by the Court of Appeals, "Our finding that Greece is not immune from suit does not prejudge any choice of law question which Greece may wish to assert on remand" (Pet. App. A-18), and by the District Court, "The present rulings, however, leave wholly open the merits of the dispute, . . .". (Pet. App. B-10, n.4) *See*, 28 U.S.C. §1606; H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 12, *reprinted in* 1976 U.S. Code Cong. & Ad News 6604, 6621.

On the merits of the sovereign immunity issue the Court of Appeals correctly concluded that "our resolution of the current Appeal is . . . a fairly straight-forward matter" (Pet. App. A-4), and unanimously held that "Greece's execution of the contract at issue in this case constituted commercial activity within the meaning of the FSIA" (Pet. App. A-15). The Court found Petitioners' argument, "that the contract can only be viewed as one small part of the Greek government's fulfillment of its constitutional obligation to provide for the health of its people", would "impermissibly depart from the 'nature' of Greece's conduct, and instead focus primary attention on the 'purpose' for which Greece entered this particular agreement." (Pet. App. A-13).

In reaching its decision, the Court of Appeals followed Congress' directive in the Foreign Sovereign Immunities Act ("FSIA") that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose". 28 U.S.C. §1603(d). Accordingly, the Court of Appeals correctly found that "[t]he source of funds to finance a particular transaction is irrelevant to the transaction's essential nature . . . [and that] the administrative trappings which may surround Greece's reimbursement scheme are ancillary to the 'basic exchange' at issue here—an undertaking to reimburse for health care services performed." (Pet. App. A-14 and A-15).

The Court of Appeals' determination comports with prior determinations of that Court and other Courts of Appeal, and Petitioners fail to make any showing that the Seventh Circuit rendered a decision in conflict with any other decision. *See Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987) (court considered the

purpose of the activity so far as was absolutely necessary to define the act in question and found nature of transaction involved a contract for product marketing services, a commercial activity); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548-50 (D.C. Cir. 1987) (court focused on the "basic exchange" and found contract between Bolivia and plaintiff corporation for plaintiff's services in designing and implementing a comprehensive program of development of Bolivia's vital areas was "of same character as contract which might be made by a private person" and fell within commercial activity exception to FSIA); *Tifa Ltd. v. Republic of Ghana*, 692 F.Supp. 393 (D. N.J. 1988) (state of Ghana's promise of exemption from import duties and waiver of mandatory cash margin, although apparently governmental activities, were ancillary to alleged promise to pay for goods and equipment used in nationwide pesticide project, and thus conduct of Ghana was "commercial activity" within meaning of FSIA).

The Court of Appeals also properly rejected Petitioners' argument that the activity in question is peculiarly within the realm of governments. The Court correctly found that private parties routinely enter into contracts to reimburse health care providers for medical services performed on third parties. (Pet. App. A-12 and A-13). The Court of Appeals also correctly relied on the fact that Congress, in the legislative history of the FSIA, mentioned on several occasions that contracts for the purchase of goods or services were activities that would normally be considered commercial. *See* H.R. No. 94-1487, 94th Cong., 2d Sess at 16, *reprinted in* 1976 U.S. Code, Cong. & Ad. News 6604; *Segni, supra*, 835 F.2d at 163; (contracts for the purchase of goods or services . . . ought normally be considered commercial"); *Practical Concepts, supra*, 811 F.2d

at 1549 (a contract between a foreign state and a private party for the purchase of goods or services . . . may presumptively be, but is not inevitably, 'commercial activity').

CONCLUSION

None of the criteria for certiorari review by this Court are present in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1602 *et seq.*

§1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or any agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§1605. General exceptions to the jurisdictional immunity of a foreign state

(a) Ã foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the

United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * *

§1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.